Filed 12/15/16 In re Z.T. CA4/2

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

In re Z.T. et al., Persons Coming Under the Juvenile Court Law.	
RIVERSIDE COUNTY DEPARTMENT OF PUBLIC SOCIAL SERVICES, Plaintiff and Respondent, v. S.G., Defendant and Appellant.	E066408 (Super.Ct.No. SWJ009844) OPINION

APPEAL from the Superior Court of Riverside County. Judith C. Clark and Timothy F. Freer, Judges.[1] Reversed with directions.

Tiffany Gilmartin, under appointment by the Court of Appeal, for Defendant and Appellant.

[1] Judge Freer found that the notice provisions of the Indian Child Welfare Act (ICWA) had been complied with and that ICWA did not apply, and Judge Clark terminated parental rights.

Gregory P. Priamos, County Counsel, and James E. Brown, Guy B. Pittman and Carole A. Nunes Fong, Deputy County Counsel, for Plaintiff and Respondent.

Defendant and appellant S.G. (mother) appeals the termination of her parental rights to minors Z.T. and J.T., following a Welfare and Institutions Code[2] section 366.26 hearing. She contends the juvenile court erred by failing to ensure compliance with the notice provisions of ICWA, and failing to apply the parental benefit exception of section 366.26, subdivision (c)(1)(B)(i). We conditionally reverse and remand for ICWA compliance.

I. FACTUAL AND PROCEDURAL BACKGROUND

On March 18, 2014, the Riverside County Department of Public Social Services (Department) filed a section 300 petition regarding Z.T. (born December 2012). The petition, as later amended, alleged that the child came within subdivision (b) due to the father's abuse of controlled substances which created a detrimental home environment, mother's unresolved mental health issues, unsanitary living conditions, and domestic dispute issues which impacted parents' ability to provide adequate care and supervision, placing the child at risk of abuse and neglect. Parents claimed Indian ancestry; however, neither was registered with any tribe, nor were they receiving any tribally-affiliated services or benefits. At the March 19, 2014, detention hearing, the court ordered both parents to submit a Parental Notification of Indian Status, complete substance abuse and parenting education classes, and clean their house. Z.T. was not detained.

[2] All further statutory references are to the Welfare and Institutions Code.

In the jurisdiction/disposition report prepared for the April 10, 2014, hearing, the Department noted that four years earlier, mother's parental rights to Z.T.'s half sibling, I., were terminated and I. was placed for adoption. At the hearing, the court found the allegations in the amended petition true, adjudged Z.T. to be a dependent of the court, retained her physical custody with the parents, and ordered family maintenance services.

On July 22, 2014, mother denied any tribal membership and reported her belief that she was only one-sixteenth Native American. The next day, the parents reported they had a "very minimal percentage of Native American ancestry." They denied any tribal registration.

On July 25, 2014, the Department initiated dependency proceedings for J.T., born in July 2014, and shortly thereafter detained him with his parents. The court ordered parents to (1) complete a parental notification of Indian status, (2) disclose the names, residency and any known identifying information of any relatives of the children, (3) complete a health and education questionnaire, and (4) submit to a search by the Department of their persons, residence and other areas. At the September 2, 2014, jurisdiction/disposition hearing, J.T. was adjudged a dependent of the court, his physical custody remained with the parents, and family maintenance services were ordered.

At the October 9, 2014, review hearing, the court found that the dependency should continue and ordered maintenance services continued. By December 16, 2014, the children were removed from parents' physical custody and placed in foster care. Although the parents had participated in and successfully completed a safe care parenting program in which a public health nurse instructed them on maintaining a clean and safe

home environment, their home remained cluttered, smelled of urine, and was infested with roaches and flies. The children and their clothing were dirty. Z.T. was found with a burn on the right side of her leg; an untreated, infected gash underneath her foot; a bruise in the middle of her forehead; and she had a lice infestation.

On December 18, 2014, a section 387 petition was filed on behalf of the children due to the parents failing to maintain a safe living environment. The petition alleged that removal from the home was in the best interest of the children due to the parents' inability to provide a safe, sanitary living environment. On December 19, 2014, the court found a prima facie showing to detain the children. The parents were provided reunification services and given supervised visitation two times per week.

On December 22, 2014, the Department mailed ICWA notices to the Bureau of Indian Affairs (BIA), Blackfeet Tribe of Montana, Cherokee Nation of Oklahoma, Eastern Band of Cherokee Indians, and United Keetoowah Band of Cherokee Indians. The notices included information for the children, parents, and mother's maternal grandmother. No information was provided regarding other relative information. On January 5, 2015, mother said that her maternal great grandfather, H.H., was a "full Cherokee" from Oklahoma.

At the January 13, 2015, jurisdictional hearing on the section 387 petition, the trial court sustained the allegations in the petition, removed the children from parents' physical custody pursuant to section 361, subdivision (c)(1), and ordered reunification services.

In April 2015, the Department filed the response letters from the tribes that were noticed. Each tribe stated the children were not Indian children. On June 10, 2015, the children were placed with the paternal grandparents. The parents were making minimal progress on their case plans and they minimized the circumstances which led to the children's removal. Both parents tested positive for marijuana and father was incarcerated with a release date in August 2015.

A contested six-month review hearing was held on August 18, 2015. Judge Freer found that ICWA did not apply, continued the dependency and reunification services, and authorized unsupervised and overnight visitation.

According to the 12-month status review report filed on February 2, 2016, in January 2016, both parents were homeless. They struggled to make a living as neither had stable employment. The children were living with their paternal grandparents, who had passed a preliminary adoption assessment and were able to provide long-term stability for them. The Department recommended terminating reunification services and setting a section 366.26 hearing. On February 9, 2016, the court concurred with the Department's recommendation, terminated reunification services, authorized supervised visitation two times per month, and set a section 366.26 hearing.

According to the report prepared for the section 366.26 hearing, the parents' visitation with the children went well; however, visitation activities were limited by the economic and transportation problems of the parents. Mother struggled for insight into her situation with the children. She asked that they be returned to her; however, she

continued to live with someone who had a past dependency case, known substance abuse history, and an open investigation for domestic violence.

At the June 8, 2016, section 366.26 hearing, mother testified via stipulated testimony that "when visits end, [Z.T.] asks if she can stay with . . . mother and that during [internet] Skype visits [Z.T.] asks the caregiver, the paternal grandparents, if she can go to mommy's house." Mother consistently engaged in appropriate visits throughout the dependency and objected to termination of her parental rights on the ground the parent-child bond exception applied. Alternatively, mother asked the court to institute a "lesser plan of legal guardianship." The court agreed that parents maintained regular visitation; however, it concluded their interaction with the children did not outweigh the benefits of adoption. The court found it was likely the children would be adopted; none of the exceptions in section 366.26, subdivision (c), applied; and termination of parental rights would not be detrimental to the children. The court therefore terminated the parents' parental rights and selected adoption as the permanent plan.

II. DISCUSSION

A. The ICWA Notice Error Requires Conditional Reversal and Remand.

Mother contends the trial court erred by failing to ensure compliance with the notice provisions of ICWA. We agree.

"ICWA protects the interests of Indian children and promotes the stability and security of Indian tribes by establishing minimum standards for, and permitting tribal participation in, dependency actions. [Citations.] If there is reason to believe a child that

is the subject of a dependency proceeding is an Indian child, ICWA requires that the child's Indian tribe be notified of the proceeding and its right to intervene. [Citations.]" (*In re A.G.* (2012) 204 Cal.App.4th 1390, 1396 (*A.G.*).)

"Accordingly, federal and state law require that the notice sent to the potentially concerned tribes include 'available information about the maternal and paternal grandparents and great-grandparents, including maiden, married and former names or aliases; birthdates; place of birth and death; current and former addresses; tribal enrollment numbers; and other identifying data.' [Citations.] To fulfill its responsibility, the [Department] has an affirmative and continuing duty to inquire about, and if possible obtain, this information. [Citations.] Thus, a social worker who knows or has reason to know the child is Indian 'is required to make further inquiry regarding the possible Indian status of the child, and to do so as soon as practicable, by interviewing the parents, Indian custodian, and extended family members to gather the information required in paragraph (5) of subdivision (a) of Section 224.2 . . . .' [Citation.] That information '*shall* include' '[a]ll names known of the Indian child's biological parents, grandparents, and great-grandparents, or Indian custodians, including maiden, married and former names or aliases, as well as their current and former addresses, birthdates, places of birth and death, tribal enrollment numbers, and any other identifying information, if known.' [Citation.] Because of their critical importance, ICWA's notice requirements are strictly construed. [Citation.]" (*A.G.*, *supra*, 204 Cal.App.4th at pp. 1396-1397.)

Challenges to the adequacy of ICWA notices and the Department's inquiry into a child's Indian ancestry are reviewed for substantial evidence. (*In re Rebecca R.* (2006)

143 Cal.App.4th 1426, 1430 [substantial evidence for the duty of inquiry]; see also *In re Merrick V.* (2004) 122 Cal.App.4th 235, 247 [to determine whether notice was adequate, court must review whether sufficient information was provided by the agency].)

Here, the ICWA notices were mailed on December 22, 2014. The notices included information on the children, parents, and mother's maternal grandmother; however, there was no information about H.H., described as a "full Cherokee" from Oklahoma, because mother had not provided the Department with any information about her maternal great grandfather until January 5, 2015. Although there is no specific requirement that the ICWA notice include information about great-great-grandparents, federal regulations provide that "[i]n order to establish tribal identity, it is necessary to provide as much information as is known on the Indian child's direct lineal ancestors *including, but not limited to,* the information delineated at paragraph (d)(1) through (4) of this section." (25 C.F.R. § 23.11(b), italics added.) While this regulation has been interpreted to mean that notice must include the names, birth dates, places of birth and death, and tribal enrollment numbers of parents, grandparents and great-grandparents, along with any known additional identifying information, it has not been interpreted to "override the provision that notice is required to include information about ancestors no more remote than the dependent child's great-grandparents." (*In re J.M.* (2012) 206 Cal.App.4th 375, 381, 382.) Nonetheless, since mother had specifically identified her maternal great grandfather as being a "full Cherokee," the social worker should have noticed the BIA, Cherokee Nation of Oklahoma, Eastern Band of Cherokee Indians, and United Keetoowah Band of Cherokee. As explained in *In re Marinna J.* (2001) 90

Cal.App.4th 731, 738, the requirement of notice is "critical" under ICWA, because it fosters one of the ICWA's major purposes "to protect and preserve Indian tribes. [Citation.] In fact, under certain circumstances . . . an Indian tribe possesses exclusive jurisdiction over child custody proceedings involving Indian children. [Citation.]" When the failure to provide ICWA notice affects the rights of an Indian tribe, such error is not harmless.

When "the juvenile court fail[s] to ensure compliance with the ICWA requirements, the court's order terminating parental rights must be conditionally reversed. This 'does not mean the trial court must go back to square one,' but that the court ensures that the ICWA requirements are met. [Citations.] 'If the only error requiring reversal of the judgment terminating parental rights is defective ICWA notice and it is ultimately determined on remand that the child is not an Indian child, the matter ordinarily should end at that point, allowing the child to achieve stability and permanency in the least protracted fashion the law permits.' [Citation.]" (*In re Gabriel G*. (2012) 206 Cal.App.4th 1160, 1168, fn. omitted.)

Based on the law and the record in this case, we conclude that the notice given was not in substantial compliance with ICWA. Because we have not found any other error (see discussion, *post*) the appropriate disposition is a limited remand for the purpose of complying with ICWA. (*In re Terrance B*. (2006) 144 Cal.App.4th 965, 971-975.) Although only mother appealed, the parental rights termination order must be conditionally reversed as to both mother and father. (*In re Mary G*. (2007) 151 Cal.App.4th 184, 208.)

B. The Beneficial Parent-child Relationship Exception Does Not Apply.

Mother contends that she established the existence of a beneficial parental relationship with her children. We disagree.

At a section 366.26 hearing, "[a]doption must be selected as the permanent plan for an adoptable child and parental rights terminated unless the court finds 'a compelling reason for determining that termination would be detrimental to the child due to one or more of the following circumstances: [¶] (i) The parents have maintained regular visitation and contact with the child and the child would benefit from continuing the relationship. . . . .' (§ 366.26, subd. (c)(1)(B).)" (*In re Bailey J.* (2010) 189 Cal.App.4th 1308, 1314 (*Bailey J.*).) This exception applies only when the relationship with a natural parent promotes the well-being of the child to such a degree as to outweigh the well-being the child would gain in a permanent home with new, adoptive parents. (*In re Autumn H.* (1994) 27 Cal.App.4th 567, 575.)

The parent has the burden of establishing by a preponderance of the evidence that a statutory exception to adoption applies. (*Bailey J.*, *supra*, 189 Cal.App.4th at p. 1314.) Mother must show that a beneficial parental relationship exists and that severing that relationship would result in great harm to her children. (*Id.* at pp. 1314-1315.) A juvenile court's finding that the exception does not apply is reviewed in part under the substantial evidence standard and in part for abuse of discretion: The factual finding, i.e., whether a beneficial parental relationship exists, is reviewed for substantial evidence, while the court's determination that the relationship does or does not constitute a "compelling reason" for finding that termination of parental rights would be detrimental

is reviewed for abuse of discretion. (*Ibid*.; accord, *In re K.P.* (2012) 203 Cal.App.4th 614, 621-622.)

To establish that the parents have occupied a "parental role," it is not necessary for a parent to show day-to-day contact and interaction. (*In re S.B.* (2008) 164 Cal.App.4th 289, 299 (*S.B.*).) As the court observed in *S.B.*, "[i]f that were the standard, the rule would swallow the exception. [Citation.]" (*Ibid*.) Instead, the court determines whether the parent has maintained a parental relationship, or an emotionally significant relationship, with the child, through consistent contact and visitation. (*Id*. at pp. 298, 300-301.) "'The factors to be considered when looking for whether a relationship is important and beneficial are: (1) the age of the child, (2) the portion of the child's life spent in the parent's custody, (3) the positive or negative effect of interaction between the parent and the child, and (4) the child's particular needs.' [Citation.] 'Interaction between natural parent and child will always confer some incidental benefit to the child. The significant attachment from child to parent results from the adult's attention to the child's needs for physical care, nourishment, comfort, affection and stimulation. [Citation.] The relationship arises from day-to-day interaction, companionship and shared experiences. [Citation.] The exception applies only where the court finds regular visits and contact have continued or developed a significant, positive, emotional attachment from child to parent.' [Citation.] Evidence of 'frequent and loving contact' is not sufficient to establish the existence of a beneficial parental relationship. [Citation.]" (*Bailey J., supra*, 189 Cal.App.4th at pp. 1315-1316.)

We agree that mother maintained regular visitation and contact with the children, and that the children experienced a bond with her, the first prong in the analysis of whether a beneficial parent child relationship exists. However, mother cannot establish that the children "'would be greatly harmed'" by terminating her parental rights. (*In re B.D.* (2008) 159 Cal.App.4th 1218, 1235.) There is nothing in the record to suggest that either child would suffer great harm as a result of proceeding with adoption and terminating parental rights.

Mother presented stipulated testimony that Z.T. would ask to go to mother's home after internet Skyping, or she would ask to stay with mother after visiting. Mother presented no evidence regarding J.T. Despite mother's testimony, Z.T. appeared to have adjusted well to the paternal grandparents' home. While she did display some frustration and "meltdowns" after visiting with her parents, she ate well, she slept well, and she had bonded to the grandparents, who provided for all her needs. At the supervised visits, mother would ask the father or the paternal grandparents for assistance with Z.T. when Z.T. would not listen, indicating that mother did not know how to parent her daughter and her daughter did not respond to her as a parental figure in her life. Most of the visits were spent watching shows or playing games on the parents' phone, and they never progressed to unsupervised visits. By the time of the section 366.26 hearing, the children had been out of mother's custody for nearly one and a half years, over a third of Z.T.'s life and the majority of J.T's. There is no showing that mother occupied a parental role in the children's lives as required for the exception to apply. (*In re Dakota H.* (2005) 132 Cal.App.4th 212, 229.)

Moreover, once mother's reunification services were terminated, the focus of the proceedings shifted to the children's need for permanence and stability. (*In re Marilyn H.* (1993) 5 Cal.4th 295, 309).) According to the section 366.26 report, the children had bonded to their paternal grandparents, appearing to be "securely attached" to both of them. They were comfortable around the paternal grandparents, playful towards them, responded well to their redirection, and went to them for help and comfort. To overcome the benefits associated with a stable, adoptive family, the parent seeking to continue a relationship with the child must prove that severing the relationship will cause not merely some harm, but great harm to the child. (*In re Brittany C.* (1999) 76 Cal.App.4th 847, 853.) There was no such showing here.

S.B., supra, 164 Cal.App.4th 289 also does not support mother's position. She compares her situation to that of the father in *S.B.* and argues that the similarities support a finding that the parental beneficial exception applies. *S.B.* recognized, however, that the exception does require evidence that the child would be "'greatly harmed'" by severance of the natural parent/child relationship. (*Id*. at p. 297, quoting *In re Autumn H., supra,* 27 Cal.App.4th at p. 575.) In *S.B.*, the father had been the child's primary caregiver for three years. (*S.B.*, at p. 298.) A bonding study indicated that "because the bond between [the father] and [the child] was fairly strong, there was a potential for harm to [the child] were she to lose the parent-child relationship." (*Id*. at p. 296.) The social worker even admitted that there would be "some detriment" to the child if parental rights were terminated. (*Id*. at p. 295.) The juvenile court found that the father and the child

had "an emotionally significant relationship." (*Id*. at p. 298.) There is no similar evidence in this case. Consequently, mother's reliance on *S.B.* is misplaced.

In sum, the record provides ample support for the juvenile court's decision not to apply the beneficial relationship exception.

III. DISPOSITION

The order terminating parental rights is reversed. We order a limited remand as follows: The juvenile court is directed to order the Department to comply with the ICWA notice provisions. If, after proper notice, a tribe claims that the children are Indian children, the juvenile court shall set a new section 366.26 hearing and it shall conduct all further proceedings in compliance with the ICWA and all related federal and state law. If no tribe makes such a claim, the juvenile court shall reinstate all previous findings and terminate parental rights.

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HOLLENHORST
Acting P. J.

We concur:

MCKINSTER
J.

CODRINGTON
J.